In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-191

DELMAR L. MARKHAM AND BRUNO PIET, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that it was error for the trial judge to refuse to grant their motion to suppress stolen goods as being the product of an illegal search.

After a jury trial in the Northern District of Illinois, petitioners were convicted of unlawfully possessing goods stolen from interstate commerce, in violation of 18 U.S.C. 659. Petitioner Markham was sentenced to a term of three years' imprisonment; petitioner Piet was sentenced to a term of eighteen months' imprisonment. The court of appeals affirmed on May 20, 1974 (Pet. App. B, pp. 42-49). A motion for rehearing was denied on July 18, 1974 (Pet. App. C, p. 50). The petition for a writ of certiorari was not filed until August 28, 1974, and is, therefore, out of time under Rule 22(2) of the Rules of the Court. There is, in any event, no occasion to grant the writ.

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. B, pp. 43-47), shows that on March 19, 1973, Russell Johnson,[1] while making a delivery to the Chippewa-McClain Motor Freight Co. of Bedford Park, Illinois, agreed to receive some Black and Decker lawn edgers from petitioner Piet, a Chippewa dock hand (Tr. 186, 189, 207).[2] The two men agreed to split the proceeds from Johnson's planned sale of the edgers (Tr. 186, 189). Johnson subsequently telephoned petitioner Markham to inquire whether he could "use" the edgers, and Markham told Johnson to transport them to the nearby Able Warehouse (Tr. 191-192). Johnson did as he had been instructed, unloading twenty-eight cartons at the Able Warehouse and retaining one for himself (Tr. 192-193). The men fixed the sale terms, and Johnson subsequently found $124 where he had asked Markham to leave the payment (Tr. 195, 219-220).

On March 21, 1973, Markham telephoned Frank Smith, acting foreman of the Able Warehouse, and asked that he separate one half of the lawn edgers because he planned to pick them up. Markham appeared later that day and loaded 13 cartons of the edgers into his automobile (Tr. 267-268).

On March 23, 1973, F.B.I. agents Flanagan and Roberts questioned Johnson, who admitted participating in the theft and also informed the agents that he had taken the edgers to the Able Warehouse (Tr. 57). The agents

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[1]Johnson, indicted with petitioners, pleaded guilty, testified for the government, and was subsequently sentenced to three years' probation.

[2]"Tr." refers to the transcript of the proceedings in this case, the original of which is being lodged with the Clerk of this Court.

then went to the warehouse, where they were met by Frank Smith, the warehouse foreman (Tr. 20, 59). Smith said that Markham was neither the owner nor an employee, but that he did rent space in a small room in the warehouse (Tr. 25, 59). Smith told the agents that the room in question was a general storage area containing merchandise other than that stored by Markham.[3] Smith and other Able Warehouse employees had access to, and did on occasion enter, the rented room; however, customers were not allowed into the storage areas (Tr. 27, 59-60). Smith additionally told the agents that Markham did not have a key to the storage area because there were only two keys, one of which was held by Smith (Tr. 18, 59).

After first informing Smith that he was under no obligation to show them the room, the agents asked if they could see the area in which Markham rented space (Tr. 20). Smith, indicating that he would be happy to show it, led the agents to the room in the warehouse where Markham rented space and opened the door, which, as was customary, was unlocked (Tr. 18, 26, 60). From the agents' position in the corridor outside of the room a pallet containing Black and Decker cartons was plainly visible (Tr. 60). The agents briefly examined the labels on the cartons and left the warehouse, asking Smith not to allow anyone in the room without authorization (Tr. 61).

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[3]Markham declined Smith's offer to remove the other merchandise, saying that "it wouldn't be necessary at that time as he didn't have that much merchandise" (Tr. 26).

That same afternoon, Markham saw Johnson and asked him if he had talked to the F.B.I. After Johnson replied that he had, Markham angrily berated him for not warning him in advance so that he could have removed the lawn edgers from the warehouse (Tr. 197, 212-213).

On March 26, 1973, the F.B.I. agents visited Markham's home and Markham voluntarily agreed to accompany them to the Able Warehouse (Tr. 284). Before entering the warehouse the agents obtained Markham's written consent to search the area which he leased (Tr. 283). The search revealed fifteen cartons of Black and Decker lawn edgers, which had been stolen from the Chippewa Motor Freight Company, in the space assigned to Markham (Tr. 280). The lawn edgers were then seized and subsequently introduced into evidence against petitioners at their joint trial.

Petitioners contend, for various reasons, that the trial judge should have suppressed the lawn edgers. They allege that the evidence was the product of a warrantless search on March 23, 1973, in violation of the Fourth Amendment, and that Markham's consent to the March 26, 1973, search was improperly induced. They also question the court of appeals' application of *United States* v. *Matlock*, 415 U.S. 164, to the facts of this case. We note initially that Piet has no standing to object to the search, since he was not present at the time of the contested searches, alleged no proprietary or possessory interest in the premises, and was not charged with an offense that included, as an essential element, possession of the seized evidence at the time of the contested search and seizure. *Brown* v. *United States*, 411 U.S. 223, 229. In any event, petitioners' conten-

tions were thoroughly examined and properly rejected by the court of appeals, on whose opinion we rely. That court held (Pet. App. B, pp. 45-56), correctly citing *United States* v. *Matlock, supra,* 415 U.S. at 171, n. 7, that permission to search may be obtained from a third party possessing either common authority over or other sufficient relationship to the premises or effects. It further stated that, on the facts of this case, Frank Smith possessed "access and control over the common area" and thus had the right to permit the inspection and that Markham assumed the risk that such a search might be authorized.

The court additionally stated that Markham's allegation that his consent to the March 26, 1973, search had been improperly induced, was refuted by the facts (Pet. App. B, p. 47).

> Markham had previously been informed that he was a suspect in the case, and he received his *Miranda* warnings. He voluntarily accompanied the agents to the warehouse. Most significantly, he was advised that he could refuse to consent to the search, yet he decided to execute the consent form. Even if the FBI agents had advised Markham that it was not necessary for him to consult with a lawyer in order to give his consent to the search and that the agents had already determined that he was storing stolen goods at the warehouse, these factually true statements do not evidence duress, coercion, chicanery or threats—factors which courts have traditionally examined to determine whether consent was freely and voluntarily granted. * * *

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.